No. 89-1416

(3)

In the Supreme Court of the United States

OCTOBER TERM, 1989

AIR COURIER CONFERENCE OF AMERICA, PETITIONER

v.

AMERICAN POSTAL WORKERS UNION,
AFL-CIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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(13)

QUESTIONS PRESENTED

1. Whether employees of the United States Postal Service, through their unions, have standing under the "zone of interests" test to challenge a Postal Service regulation permitting private mail services to engage in international remailing.

2. Whether the Postal Service acted arbitrarily and capriciously in promulgating its international remailing regulation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 891 F.2d 304. The opinion of the district court (Pet. App. 28a-38a) is reported at 701 F. Supp. 880.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1989. The petition for a writ of certiorari was filed on March 8, 1990. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States Postal Service has since the days of the Articles of Confederation exercised a statutory monopoly over the carriage of mail in and from the United States. This monopoly is intended to ensure uniform rates and "prompt, reliable, and efficient services to [postal] patrons in all areas" of the country. *Regents of the University of California* v. *Public Employment Relations Board*, 485 U.S. 589 (1988) (emphasis omitted) (quoting 39 U.S.C. 101(a)). The statutes setting forth this monopoly are known as the Private Express Statutes (PES), 18 U.S.C. 1693-1699, 1729, and 39 U.S.C. 601-606. At issue in this case is a provision of the PES that authorizes the Postal Service to suspend its monopoly "upon any mail route where the public interest requires the suspension." 39 U.S.C. 601(b).

Acting under its authority to suspend the monopoly conferred by the PES, the Postal Service in 1979 authorized private mail services to provide "extremely urgent letters," more commonly known as express mail or overnight delivery service. See 44 Fed. Reg. 61,178 (1979). Various private mail services interpreted this authority to permit a practice called "international remailing," whereby a private service carries mail to a foreign country and then deposits it in a foreign mail system for final delivery. The Postal Service initially proposed to prohibit this application of the urgent letter authority. See 50 Fed. Reg. 41,462 (1985). However, the business community and members of Congress and the Executive Branch urged the Service to reconsider its position, arguing that international remailing enhances the competitive position of American companies abroad.

The Postal Service agreed to reconsider its position, and instituted a rulemaking designed "to remove the cloud" over the validity of international remailing services. See 51 Fed. Reg. 29,636 (1986); 39 C.F.R. 320.8. Although the comments received by the Postal Service in the rulemaking concerning the economics of international remailing were not as precise and detailed as it had hoped, the Service nevertheless concluded that it had "compiled a record which appears to demonstrate the existence of a public benefit and to support the suspension." 51 Fed. Reg. 29,637 (1986); Pet. App. 23a. The Postal Service therefore issued a final rule suspending the operation of the PES to international remailing services.

2. Two postal worker unions brought this action in district court, challenging the international remailing regulation on the ground that the rulemaking record was inadequate to support a finding that the suspension of the PES for international remailing was in the "public interest." The complaint alleged that the unions' claims arose under the Private Express Statutes and regulations, the Declaratory Judgment Act, 28 U.S.C. 2201, and the mandamus statute, 28 U.S.C. 1361. Compl. 1 (dated Nov. 16, 1987). It did not allege that their claims arose under the Administrative Procedure Act (APA), 5 U.S.C. 701-706. See Compl. 1.

The district court dismissed the union's complaint on two grounds. The court first held that while the postal workers' interest in job security was sufficient to confer Article III standing, the unions did not satisfy prudential standing limitations. Specifically, the court held that the unions' interest in preserving employment opportunities with the Postal Service did not fall within the "zone of interests" protected by

the Private Express Statutes. Pet. App. 30a-34a. Second, the district court ruled that even if the unions' complaint were to be considered on the merits, the Postal Service's decision was not arbitrary and capricious, and was based on an adequate rulemaking record. *Id.* at 34a-38a.

3. The court of appeals reversed. It held that the unions satisfied the zone of interests requirement for APA review under *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388 (1987), and that the Postal Service's regulation was arbitrary and capricious, because the Service relied on too narrow an interpretation of "the public interest."

On the standing question, the court noted (Pet. App. 4a) that "[a]lthough the USPS is exempt from the strictures of the Administrative Procedure Act ('APA'), *see* 39 U.S.C. § 410(a), it has chosen to follow APA procedures when promulgating rules affecting the PES. *See* 39 CFR § 310.7 (1988)." The court therefore concluded that Section 702 of the APA, 5 U.S.C. 702, and the "zone of interests" test which this Court has recognized as "a gloss on § 702 of the APA," Pet. App. 6a, applied to this case.

In determining that the interest in employment opportunities asserted by the postal unions fell within the zone of interests protected by the PES, the court observed that the PES were reenacted as part of the Postal Reorganization Act (PRA), Pub. L. No. 91-375, 84 Stat. 719. A "key impetus" and "principal purpose" of the PRA, in turn, was "to implement various labor reforms that would improve pay, working conditions and labor-management relations for postal employees." Pet. App. 8a. Reasoning that "[t]he Unions' asserted interest is embraced directly by the labor reform provisions of the PRA" and that

"[t]he PES constitute the linchpin in a statutory scheme concerned with maintaining an effective, financially viable Postal Service," the court concluded that "[t]he interplay between the PES and the entire PRA persuades us that there is an 'arguable' or 'plausible' relationship between the purposes of the PES and the interests of the Unions [*sic*]." *Id.* at 8a-9a. The court also held that "the revenue protective purposes of the PES, standing alone, plausibly relate to the Unions' interest in preventing the reduction of employment opportunities," because "postal workers benefit from the PES's function in ensuring a sufficient revenue base" for the Postal Service's activities. *Id.* at 9a.

On the merits, the court of appeals held that the Postal Service had considered only the cost savings and service benefits to the international business sector from the suspension of the PES in favor of private international remailing, and had not adequately considered the effect of the regulation "on those [other] consumers who would continue to use the Postal Service, both from a price and service perspective." Pet. App. 14a. The court therefore remanded the case to the Postal Service for it to reconsider the issue. *Id.* at 16a.

ARGUMENT

1. Petitioner primarily renews its contention that the postal unions have not advanced a claim within the "zone of interests" protected by the PES. Although our brief in the court of appeals assumed that the "zone of interests" test applies in this case, on further review of the record we have concluded that this question is not presented. Because this alternative ground for dismissal was not previously raised in this litigation, and because the court of appeals'

decision does not conflict with any other post-*Clarke* decision construing the "zone of interests" test, review by this Court is not warranted.[1]

The parties and the courts below erroneously analyzed this case under the principles for judicial review under the APA, 5 U.S.C. 701-706. The court of appeals' discussion of the "zone of interests" standing question was premised on its understanding, Pet. App. 6a, that "[t]he Unions' cause of action derives from § 702 of the APA, which grants standing to a person 'aggrieved by agency action within the meaning of the relevant statute.' 5 U.S.C. § 702 (1982)." That understanding, however, is clearly wrong both as a factual and as a legal matter.

The unions did not in fact invoke the APA as a basis for their claim. See Compl. 1. Rather, their complaint sought relief directly under the PES and implementing regulations, under the Declaratory Judgment Act, 28 U.S.C. 2201, and under the mandamus statute, 28 U.S.C. 1361. Compl. 1.

The evident reason the unions did not seek relief under the APA is because the APA is not legally applicable to their complaint. Section 410(a) of Title 39 specifically provides (with exceptions not relevant here) that "no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, *including the provisions of chapters 5 and 7 of title 5*, shall apply to the exercise of the powers of the Postal Service" (emphasis added). Chapters 5 and 7 of Title 5 are the provisions of the APA dealing with "Administrative Procedure" (Chapter 5) and "Judicial Review" (Chapter 7). Thus, 39 U.S.C. 410(a), by its terms, expressly "preclude[s] judicial review" under the APA, 5 U.S.C. 701(a)(1).

[1] The United States Postal Service is a respondent pursuant to Rule 12.4 of the rules of this Court. Petitioner, an intervenor below, appears to be a proper petitioner. See *Bryant* v. *Yellen*, 447 U.S. 352 (1980).

Because the judicial review provisions of the APA do not apply here, and because the unions have cited no other law expressly authorizing them to seek APA judicial review,[2] the court of appeals erred in relying on the "zone of interests" test to evaluate their standing. As this Court noted in *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 400-401 n.16, the "generous" zone of interests test is "most usefully understood as a gloss on the meaning of § 702 [of the APA]," not as a general prudential standing standard that applies whatever the cause of action.

The court of appeals recognized that the Postal Service is exempt from the provisions of the APA. Pet. App. 4a. It nevertheless observed, *ibid.*, that the Postal Service has provided by regulation that "[a]mendments of the regulations [such as the one at issue here] may be made only in accordance with the rulemaking provisions of the Administrative Procedure Act." 39 C.F.R. 310.7. This provision, however, at most may be read to mean that the Postal Service has subjected itself to the provisions of *Chapter 5* of the APA that set forth the procedures to be employed by an agency when it conducts a rulemaking. See 5 U.S.C. 553. The court cited no regulation or other statement by the Postal Service agreeing to subject itself to the judicial review provisions of *Chapter 7*.

[2] In fact, given that Chapter 7 of the APA does not apply, the unions have identified no applicable waiver of sovereign immunity, see 5 U.S.C. 702, 704, or any applicable cause of action, see 5 U.S.C. 702.

Although the foregoing objections to the availability of judicial review under the APA are by their nature jurisdictional, see *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 353 n.4 (1984), they were not presented below and have not been developed in this or other litigation. Accordingly, they do not warrant review by the Court at this time.

In any event, even if the issue of APA standing were properly presented in this case, it would not warrant this Court's consideration. Petitioner asserts that the decision below conflicts with a decision of the Sixth Circuit denying standing to postal unions under analogous circumstances. *American Postal Workers Union, Detroit Local* v. *Independent Postal System of America, Inc.*, 481 F.2d 90 (1973), cert. dismissed, 415 U.S. 901 (1974). However, that case (like this one) was not brought under the APA, see 481 F.2d at 92, and pre-dates this Court's recognition in *Clarke* that the "zone of interests" test is a construction of the APA. Thus, the Sixth Circuit's decision—and the other cases cited by petitioner that predate *Clarke* (Pet. 8-9)—are not reliable indicators of how those courts would rule on the zone of interests standing issue if it were presented to them today. Any further consideration of the meaning of the "zone of interests" standard should await such time as the lower courts have more fully considered this Court's decision in *Clarke*.

2. Petitioner's contention that the court of appeals misinterpreted the "public interest" standard for suspension of the PES, 39 U.S.C. 601(b), also does not warrant review. Even if, in the jurisdictional posture of this case, the question could be reached, petitioner cites, Pet. 17-18, no conflicting appellate decisions, and argues only that the court of appeals failed to show proper deference to the agency's in-

terpretation of the statute. The Postal Service did not file a petition for certiorari in this case, however, and the court of appeals' decision does not rule out the possibility that on remand the Postal Service could justify the same or a similar rule after giving further consideration to the factors suggested in the court of appeals' opinion. Given the interlocutory posture of the case, there is no need to consider the question at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1990

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* The Solicitor General is disqualified in this case.

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